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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 355

HARVEY COAL CORPORATION,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF.

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Your petitioner, Harvey Coal Corporation, by its attorney, prays that a writ of certiorari issue to review the decision of the United States Circuit Court of Appeals for the Sixth Circuit entered in the above entitled case on February 13, 1941 (118 F. (2d) 350), affirming the judgment of the United States District Court for the Eastern District of Tennessee, Northern Division, entered June 22, 1939 (not reported but found in 1939 CCH, ¶ 9604). A petition for rehearing filed in the lower Court March 13, 1941, was denied April 14, 1941. By order of this Court dated July 10, 1941, the time within which to file this petition was extended to and including August 8, 1941 (R. 154).

This is a suit for the recovery of Federal income and excess profits taxes for the calendar year 1917 collected after the statute of limitations had run. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938 (28 U. S. C. A., Sec. 347).

Questions Presented.

1. Was the additional tax and interest for 1917 collected from the appellant after the statutory period of limitation upon collection had expired?

2. Was the claim for abatement involved herein a valid claim so as to toll the statute of limitation?

3. Is the appellant estopped from denying the validity of the claim for abatement?

Reasons for Allowance of Writ.

1. The case presents an important Federal question which should be settled, namely, whether a claim for abatement filed by someone other than the taxpayer, and without the taxpayer's knowledge or consent, constitutes a valid claim so as to toll the statute of limitations upon collection.

2. The broad holding of the court below that a lease which provides for the payment of the lessor's Federal income and excess profits taxes by the lessee authorizes the lessee to file a claim for abatement which will be binding upon the lessor, though filed without its knowledge or consent, is fundamentally unsound.

3. The opinion of the court below impliedly sanctions the irregular procedure of the Commissioner of Internal Revenue in recognizing and negotiating with representatives of the lessee in connection with the lessor's tax lia-

bility, without the knowledge or consent of the lessor, the petitioner herein.

4. The opinion of the court below impliedly sanctions both the failure of the trial court to grant the petitioner's request for findings of fact, which are vital to the question of whether the claim for abatement was valid, and the dismissal, in toto, of the amended petition.

Conclusion.

For the foregoing reasons, which are amplified in the accompanying brief, it is respectfully requested that this petition be granted.

Respectfully submitted,

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BRIEF.

Opinion Below.

The opinion of the United States Circuit Court of Appeals for the Sixth Circuit (R. 153) is reported at 118 F. (2d) 350.

The opinion of the United States District Court for the Eastern District of Tennessee, Northern Division (R. 44) is not reported but appears in 1939 CCH, ¶ 9604.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938 (28 U. S. C. A., Sec. 347).

Questions Presented.

The questions presented appear in the petition for a writ of certiorari, *supra*, p. 2.

Statutes Involved.

The pertinent provisions of the statutes involved are set forth in the Appendix, *infra*, p. 20.

Statement of the Case.

The petitioner, plaintiff below, filed suit in the United States District Court for the Eastern District of Tennessee, Northern Division, for the recovery of additional Federal income and excess profits taxes and interest thereon for the calendar year 1917, in the sum of $29,015.97, together with interest (R. 1). The sole ground for recovery alleged in the original petition, filed December 23, 1929 (R. 1), was that the additional tax of $19,812.91, plus interest of $9,203.06 was collected January 29, 1925, after

the expiration of the statutory period of limitation. The answer thereto (R. 14) included a plea of confession and avoidance, alleging the filing of an abatement claim by the taxpayer July 25, 1919, which operated as a stay of collection.

By amended petition, filed July 13, 1933 (R. 18), over the oral objection of defendant (R. 25), plaintiff restated its allegations with respect to the issue involving the statute of limitations, correcting certain errors with respect thereto. It also set up new grounds for recovery. The defendant moved to strike the amended petition on the ground that it raised new issues after the statutory period for commencing suit had run (R. 25). Action on said motion was deferred until the court rendered its opinion, at which time it was sustained (R. 52). The answer to the amended petition contained a plea of confession and avoidance (R. 29) which is identical with that filed to the original petition (R. 14). Plaintiff's reply to the answer denies any knowledge of the assessment by the Commissioner of Internal Revenue of an additional tax for the year 1917, or the filing of an abatement claim in connection therewith, either by plaintiff or its predecessor, Harvey Coal Company, and avers that if any abatement claim was filed, it was without the knowledge, sanction, authority, or ratification of the Harvey Coal Company (R. 31, 34).

Trial was had July 26, 1933 (R. 72). Requests for special findings were filed by the plaintiff September 25, 1934 (R. 36), and by the defendant October 12, 1935 (R. 36).

June 22, 1939, the District Court sustained the defendant's motion to strike the amended petition and dismissed the action. It disregarded the amended petition insofar as it sought to amend with respect to the issue raised in the original petition, and likewise disregarded the uncontroverted evidence in support thereof. Instead, it regarded

only the new issues raised in the amended petition, which were expressly waived on appeal.

July 3, 1939, plaintiff filed a motion for additional findings of fact and amendment of judgment (R. 53). Pursuant to memorandum of the lower court filed July 12, 1939 (R. 53), plaintiff, on July 26, 1939, filed a detailed list of additional and amended findings requested (R. 54), which requests were allowed in part August 29, 1939 (R. 66), without any change in the opinion (R. 47) or judgment (R. 53).

The Circuit Court affirmed the judgment of the District Court, *per curiam*, February 13, 1941 (R. 153). Petition for rehearing filed March 13, 1941 (R. 154) was denied April 14, 1941 (R. 154).

Facts.

Harvey Coal Corporation, the plaintiff, was incorporated under the laws of the State of Tennessee, November 20, 1924 (R. 130), and is the successor of Harvey Coal Company, a Tennessee corporation, organized March 16, 1915, with its executive office at Knoxville, Tennessee, and mine operating office at Staub, Perry County, Kentucky (R. 85, 129). Up to October 30, 1917, Harvey Coal Company was engaged in the mining of coal (R. 72, 82).

On that date, it leased its mining properties to The Hazard Jellico Coal Company, a Delaware corporation (R. 130). The Hazard Jellico Coal Company was one of twenty-odd mining companies owned by the Jewett-Bigelow & Brooks Company, a Michigan corporation, with its principal office at Detroit (R. 72, 73, 78). The executive office of The Hazard Jellico Coal Company was at Detroit, the operating office at Cincinnati, and the mine operating office at Staub, Kentucky (R. 73).

Under said lease (R. 130), The Hazard Jellico Coal Company covenanted to pay all taxes including Federal income and excess profits taxes "which have been or which may

hereafter be assessed against Harvey Coal Company for the year 1917'' (Par. 5). Said lease also stipulated that E. L. Douglass, the then General Manager of Harvey Coal Company, should be placed in charge of the properties leased by The Hazard Jellico Coal Company and should have full charge of the mining operations conducted thereon (Par. 7).

Prior to October 30, 1917, E. L. Douglass, an engineer, was General Manager of the Harvey Coal Company and in charge of the operation of its mine (R. 72, 82). He was not an officer of the company (R. 82). On October 30, 1917, Douglass left the employ of Harvey Coal Company and, pursuant to the terms of said lease, became Vice President and Manager of operations of The Hazard Jellico Coal Company, with his office at Staub, Kentucky (R. 72, 73, 82).

The Federal income and excess profits tax returns of Harvey Coal Company for the year 1917, filed March 21, 1918, were signed and sworn to by C. H. Harvey, President, and Fritz Staub, Treasurer, and the address shown was Staub, Kentucky (R. 73, 132). The original tax of $33,431.73 is not in controversy.

Thereafter, the Commissioner of Internal Revenue made an audit of said returns, the results of which appear in his letter dated January 6, 1919 (R. 95). Said letter shows a total tax assessable of $77,751.23 and an additional tax liability of $44,319.50, which was assessed on the April, 1919, List (R. 95, 123). Neither this letter nor its contents were made known to the officers of Harvey Coal Company (R. 73, 83), although it was addressed to Harvey Coal Company, Staub, Kentucky (R. 95). Instead, the Commissioner's letter of January 6, 1919, was forwarded to Mr. John R. Schindel, Cincinnati, Ohio, attorney for The Hazard Jellico Coal Company (R. 73, 79).

Under date of July 24, 1919, in response to demand for said additional tax of $44,319.50, a letter was addressed

to the Collector of Internal Revenue, Danville, Kentucky, enclosing a check in the sum of $16,694.14 and a claim for the abatement of the balance, $27,625.36 (R. 102-103). This letter was signed "Harvey Coal Company by E. L. Douglass, General Manager" (R. 103). The claim for abatement referred to in said letter of July 24, 1919, is signed "Edward L. Douglass, General Manager, Harvey Coal Company" and was sworn to July 24, 1919, in Hamilton County, Ohio (R. 97). Attached to said claim for abatement are several documents. The first is a copy of letter dated July 10, 1919, addressed to the Commissioner of Internal Revenue from Waite, Schindel & Bayless (R. 99), the original of which was mailed July 10, 1919 (R. 103). Said letter refers to affidavits of Mr. E. L. Douglass "former General Manager" of Harvey Coal Company (R. 99, 100). Two affidavits of E. L. Douglass, "former General Manager" of Harvey Coal Company, were attached (R. 100, 102). While it was contemplated sending the abatement claim to the Harvey Coal Company for execution, for some reason this was not done (R. 78, 79, 81, 106).

By letter dated October 11, 1920, addressed to Harvey Coal Company, Staub, Kentucky, the Commissioner of Internal Revenue allowed the said claim for abatement in the amount of $5,466.08 and rejected the same in the amount of $22,159.28 (R. 104-106).

The Commissioner's letter dated January 8, 1924, addressed to Harvey Coal Company, Staub, Kentucky (R. 115), set forth the result of the reexamination of the company's returns for the year 1917 "in connection with information furnished in support of your claim for the abatement of $27,625.36" and proposed an additional allowance of $34.32. By letter dated February 5, 1924, to the Commissioner of Internal Revenue from the National Tax Service Bureau, Washington, D. C., and under the alleged authority of a power of attorney from The Hazard Jellico

Coal Company, "the successors of the Harvey Coal Company," an appeal was transmitted directed to said letter dated January 8, 1924 (R. 119-120). The appeal was signed "The Harvey Coal Company, Hazard Jellico Coal Company (Successors) by E. H. Jewett, President" and was attested by E. C. Smith, Secretary.

As a result of said "appeal", a reaudit of the returns of Harvey Coal Company for 1917 was made, resulting in an additional allowance of $2,346.37, in lieu of that set forth in letter dated January 8, 1924. This allowance appears in a certificate of overassessment addressed to Harvey Coal Company, Staub, Kentucky, dated November 17, 1924 (R. 120-123).

Up to this point, the officers of Harvey Coal Company knew nothing of any of the audits made by the Bureau of Internal Revenue, nor of letters setting forth the results thereof, nor conferences or protests appertaining thereto; neither did they have any knowledge of any claim for abatement filed allegedly on behalf of Harvey Coal Company; nor did they at any time ratify or approve the filing of said claims (R. 73, 74, 75, 76, 77, 78, 79, 80, 81, 83, 84, 85, 94, 99, 103, 106, 108, 109, 110, 111, 112, 113, 114, 118, 119, 120, 148, 149). In fact, it was not until January 17, 1925, that they or the officers of the newly formed Harvey Coal Corporation acquired any knowledge of the additional tax for the year 1917, when the demand for payment of the unabated portion was made of the appellant by the Collector (R. 83, 85, 86). Mr. Douglas on two or three different occasions had assured the Secretary and Treasurer of Harvey Coal Company that all the income taxes had been paid (R. 83).

All correspondence with respect to the audits of Harvey Coal Company's returns for 1917 and the said abatement claim, as well as all conferences with respect thereto, were carried on between the Commissioner and representatives

of The Hazard Jellico Coal Company (R. 73, 74, 75, 76, 77, 78, 79, 80, 81, 99, 103, 106, 107, 108, 109, 110, 111, 112, 113, 114, 118, 119, 120, 148, 149). The Hazard Jellico Coal Company paid such representatives for such services (R. 80, 110). The records of the Commissioner of Internal Revenue show that no one was authorized to represent Harvey Coal Company for 1917 previously to August 19, 1926 (R. 129) and that no one was authorized to represent Harvey Coal Corporation previously to February 4, 1930 (R. 128).

The Hazard Jellico Coal Company was in a good financial condition during the years 1919 to 1921 and could have paid the amount of the claim for abatement, $27,625.36, had the defendant made a definite move to collect (R. 74, 76). It was not until 1924 that the Hazard Jellico Coal Company became involved in financial difficulties (R. 74). In April of that year, the company went into receivership (R. 80) and Harvey Coal Company repossessed the leased premises (R. 84). The appellant paid under protest the additional tax of $19,812.91 plus interest of $9,203.06, or a total of $29,015.97, January 8, 1925 (R. 83, 86-87, 133).

Four claims for refund were filed relating to the income and excess profits tax liability of Harvey Coal Company for the year 1917 (R. 125, 135, 141, 145). Only one of these claims is now in issue. That is the claim filed May 2, 1927, with the Collector at Nashville and by him forwarded to the Collector at Louisville, Kentucky, where it was received May 12, 1927 (R. 145). This claim is based upon the erroneous and illegal collection of the sum of $29,015.97, additional tax and interest for 1917, after the statute of limitations had run. It forms the sole ground in the original petition (R. 1) and is the principal ground set forth in the amended petition (R. 18). Said claim has never been rejected by the Commissioner of Internal Revenue (R. 95).

Specification of Errors to be Urged.

The court below erred:

1. In holding that the statute of limitations upon collection of the tax was tolled by a valid claim for abatement.

2. In holding that the lease involved herein vested the lessee with authority to file a claim for abatement which would bind the lessor, petitioner herein.

3. In holding that petitioner is without right to question the validity of the claim for abatement filed.

4. In failing to reverse the judgment of the District Court.

ARGUMENT.

1. **No valid claim for abatement was filed.**

The error of the lower court in sustaining the decision of the trial court is manifest if no valid claim for abatement was filed so as to stay the statutory period for collection of the additional tax. That no valid claim for abatement was filed is apparent from the facts of record in this case.

The trial court in its findings of fact states that certain claims in abatement were filed which enured to the benefit of the taxpayer (R. 44). Nowhere in the findings of fact does it appear who filed the abatement claim. The petitioner sought to clarify the facts in this regard by its request for additional and amended findings of fact (R. 54), but was unsuccessful. Neither was it able to correct this omission of vital facts in the court below. Only one claim for abatement was filed and that claim shows on its face (R. 97) that it was not the claim of the petitioner, since it is executed, not by the taxpayer but by

"Edward L. Douglass, General Manager, Harvey Coal Company", which is further explained, by the attachments thereto (R. 99-102), as referring to Edward L. Douglass "*former* General Manager". At that time, Mr. Douglass was Vice President and Manager of operations for The Hazard Jellico Coal Company, the lessee.

It is fundamental that under the law, regulations, and practice then in effect, an assessment of additional tax against a taxpayer could be stayed only by the filing of an abatement claim, or the equivalent thereof *by the taxpayer.* Clearly, this was not the claim of the taxpayer, but was one filed, without the knowledge or consent of the taxpayer, and by someone who was wholly unauthorized by the taxpayer to file it.

Little in the way of authorities should be required to support the obvious proposition that Harvey Coal Company cannot be bound by any act of an unauthorized person presuming to act in its behalf, but without its knowledge or consent, and without any subsequent ratification or adoption by it or its successor, the appellant. The scarcity of authorities attests the axiomatic character of this proposition. A few decisions, however are helpful, principal among which is *Commissioner* v. *Bryson,* 79 F. (2d) 397. In that case, the question involved was the validity of a waiver which had been executed by a *former* Secretary of the corporation. It was held to be invalid for the reason that a *former* officer lacked authority to bind the corporation. To the same general effect are *Merchants' Nat. Tr. & Svgs. Bank* v. *Welch,* 8 F. Supp. 949; *Tower Hill, etc. Coke Co.* v. *Heiner,* 25 F. Supp. 505.

If a former officer cannot bind a corporation, certainly a *former employee* cannot. In the *Bryson* case, *supra,* as in this case, the Commissioner was put on notice that he was dealing with a *former* officer or employee of the taxpayer, and in this case, as in the *Bryson* case, it should

have been held that the Commissioner "as a reasonable man, should have been put on notice that both in fact and in law, he had before him an abortive paper," which did not bind the corporation.

The lower court took the view that the inherent and fatal effects in the abatement claim filed could be disregarded because of the lease between the taxpayer and the Hazard Jellico Coal Company.

2. Validity of the abatement claim cannot be imputed from the lease.

By lease dated October 30, 1917, the taxpayer leased its mining properties to the Hazard Jellico Coal Company (R. 130). Paragraph 5 thereof provides for the payment by the lessee of all taxes, including all Federal income and excess profits taxes assessable against the lessor for the year 1917. This provision, in the opinion of the lower court, vested the lessee with authority to file a claim for abatement which would be binding upon the lessor, the petitioner herein. Such a view is remarkable in two respects: first, it disregards the established practice and procedure whereby a taxpayer, and the taxpayer alone, could stay the collection of a tax by the filing of an abatement claim and, secondly, it conflicts with the general law on the subject. Furthermore, it is questionable whether the claim was filed by the lessee since it was executed by an individual representing himself to be a former General Manager of the taxpayer.

In view of the normally adverse interests of the lessor and the lessee under a lease, the authorities are uniformly to the effect that a lease does not constitute a contract of agency unless specifically so provided. While there sometimes is doubt as to whether a particular document constitutes a lease or a contract of another nature, once it is resolved to be a lease, the lessee cannot bind the lessor

under any theory of agency; neither can a third party collaterally raise the issue. Such was the holding in *Freiberg, Klein & Co.* v. *B. H. & S. I. Co.*, 63 Tex. 449. A more recent decision, in *Denver Tramway Corp.* v. *Rumry*, decided by the Supreme Court of Colorado in 1935, 52 P. (2d) 396, 398, enunciated the doctrine as follows:

> The relation of landlord and tenant exists by virtue of contract, and a tenant is not the agent of the landlord for any purpose, unless made so by specific agreement.

In principle, this is the holding in *Davis v. Henry Clay Fire Ins. Co.*, 216 Ky. 715, 288 S. W. 674.

The facts in the case at bar illustrate the sound reasoning behind these decisions. In 1919 when the abatement claim was filed, the lessee, The Hazard Jellico Coal Company, was in good financial condition and could have paid the amount of tax involved had the Collector of Internal Revenue demanded payment from the taxpayer. Unknown to the taxpayer, the lessee conducted negotiations with the Commissioner of Internal Revenue relative to the abatement claim, extending into the year 1924. By that time, the lessee had become involved in financial difficulties and was in receivership. Thus, instead of acting as agent for the lessor, it acted adversely to the lessor's interest, and, thereby, was able to escape payment of the lessor's tax under paragraph 5 of the lease.

There being no specific agreement in the lease which would authorize the lessee to file an abatement claim which would have binding effect upon the lessor, the inherent defects in the abatement claim are not aided or cured by the lease and the claim for abatement remains ineffective and invalid.

3. The petitioner may properly question the validity of the claim for abatement.

The opinion of the court below indicates some misgivings as to the validity as to the claim for abatement but sustains the decision of the trial court on the basis that the petitioner is without right to question the validity of the claim whether on the ground of estoppel, agency, or on the principle of taking a position inconsistent with one previously assumed.

The application of the principles of agency to this situation are clearly removed by the showing of an absence of agency under the lease. The implication that there has been a change of position on the part of the petitioner may be as summarily disposed of by pointing to the undisputed facts that the petitioner had no knowledge of the proposed assessment of the additional tax, the filing of an abatement claim, or any negotiations with respect thereto, until 1925, when demand for payment was made following the final rejection of the abatement claim. The position then taken, and the only position that ever has been taken by petitioner, was that the tax was collected after the running of the statute of limitations.

The remaining ground asserted by the court below in denying the petitioner the right to question the validity of the claim is that of estoppel. The application of the doctrine of estoppel is clearly defined by the decided cases. It is well stated in *United States* v. *S. F. Scott & Sons, Inc.*, 69 F. (2d) 728, as follows:

> To constitute estoppel (1) there must be false representation or wrongful misleading silence. (2) The error must originate in a statement of fact and not in an opinion or a statement of law. (3) The person claiming the benefits of estoppel must be ignorant of the true facts, and (4) be adversely affected by the

> acts or statements of the person against whom an estoppel is claimed.

It is difficult to understand how the appellant or its predecessor, Harvey Coal Company, could have misled the Commissioner with respect to the abatement claim. Misleading is a deliberate act, which necessarily presupposes knowledge. In the absence of knowledge, as in this case, there could be no misleading. The abatement claim showed, by its attachments, the lack of authority on the part of E. L. Douglass and, consequently, the lack of legal effect so far as Harvey Coal Company was concerned. As stated in the concurring opinion in *Commissioner* v. *Bryson, supra:*

> I know of no doctrine of estoppel to deny that a written instrument is something other than what its terms necessarily import, except as based on some fraud or misrepresentation.

In the language of the Circuit Court of Appeals for the Fourth Circuit in *A. G. Hull* v. *Commissioner,* 87 F. (2d) 260:

> Estoppel is an affirmative defense and the burden is upon the party asserting it to establish both the facts necessary to support it and the fairness of its application and a party either knowing the facts, *or in a position to know them* cannot claim the benefit of estoppel. Helvering *v.* Brooklyn City R. R. Co., 72 F. (2d) 274. Jones on Evidence (3rd Ed.) Par. 279. (Italics supplied.)

Tested by this language the doctrine of estoppel utterly fails in its application to the facts in the case at bar. To the same effect is *Tower Hill, etc., Coke Co.* v. *Heiner, supra.*

It is well to consider at this point the old principle of equity, amounting to an adage, that where one of two

innocent parties must suffer, the loss must fall upon him whose act or failure to act occasioned the loss. If the Collector of Internal Revenue or his principal, the Commissioner of Internal Revenue, is, therefore, an innocent party, it was nevertheless through his negligent acts that collection of the additional tax for the year 1917 was delayed beyond the statutory period of limitations.

The Commissioner of Internal Revenue was on notice at the outset that the claim for abatement was not a valid claim. In corresponding with and recognizing persons other than the duly accredited representatives of the taxpayer in discussing the taxpayer's tax liability, the Commissioner departed from his own rules and regulations with respect to powers of attorney. Typical of such rules are the "Conference and Practice Requirements—Income Tax Unit" issued by the Commissioner under date of June 1, 1922, C. B. I—1, 419, 420, which requires that in the case of a corporation, a power of attorney "must be signed by an officer of the corporation, attested by the secretary under the seal of the corporation and executed before a notary or attested" by two disinterested individuals.

It is established in this case that the records of the Commissioner of Internal Revenue show that no one was authorized to represent Harvey Coal Company for 1917 previously to August 19, 1926 (R. 129), and that no one was authorized to represent Harvey Coal Corporation previously to February 4, 1930 (R. 128).

The lower court impliedly excuses this dereliction on the part of the Commissioner because of the lease with the Hazard Jellico Coal Company. But, according to the specific findings of the trial court, "the defendant had no notice of this lease" (R. 44). Even if the Commissioner had known of the provisions in the lease, his irregularity in departing from his customary and established procedure

with respect to recognition of taxpayer's representatives would have been inexcusable. Without such knowledge the opinion of the lower court in that regard falls of its own weight.

It was the prolonged negotiations, extending over approximately five years, which account for the fact that collection of the additional tax was not timely made, and for the further fact that when the taxpayer was notified of such liability and demand for payment made of it, no recourse could be had under the lease because of the supervening receivership of the lessee.

4. The judgment of the trial court should have been reversed.

The attention of the lower court was called to the failure by the District Court to make specific findings of fact, particularly with reference to the abatement claim upon the validity of which this case turns. It also was requested to correct the error of the District Court in dismissing the amended petition in its entirety, rather than permitting such portion thereof as constituted an amendment by way of clarification of the original petition, to stand. During the six year period between the date of the trial and the date of decision by the District Court, the Federal Rules of Civil Procedure became operative. Under those liberalized rules, the amended petition in so far as it did not introduce a new cause of action should have been allowed "as matter of course" (Civ. Proc. Rule 15) and the request for additional and amended findings of fact, to correct omissions and conclusions in the trial court's findings, should likewise have been allowed (Civ. Proc. Rule 52 (b)).

These errors by the District Court were impliedly sanctioned by the lower court without comment.

Conclusion.

For the foregoing reasons, it is respectfully urged that the petition for a writ of certiorari be granted.

Respectfully submitted,

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